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CHEW WAI KEONG

v.

PP

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HIGH COURT MALAYA, IPOH
TEO SAY ENG JC
[CRIMINAL APPLICATION NO: 44-10-2010]
22 OCTOBER 2010

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CRIMINAL PROCEDURE: Courts - High Court - Inherent powers - Whether court has inherent power to acquit and discharge accused - Whether s. 173(g) Criminal Procedure Code could be invoked - Whether court's inherent powers could be exercised to override express provision of law - Whether decision to continue prosecution vested solely with Attorney General - Federal Constitution, art. 145(3)

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CRIMINAL PROCEDURE: Prosecution - Attorney General - Whether decision to continue or discontinue prosecution vested solely with Attorney General - Court's inherent power to acquit and discharge accused - Whether court's inherent powers could not be exercised to override express provision of law - Whether accused had option to make representation to Attorney General to enter nolle prosequi - Federal Constitution, art. 145(3)

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The applicant had been jointly charged with another person for the offence of kidnapping under s. 3 of the Kidnapping Act 1961. They were then jointly charged under s. 302 of the Penal Code with murdering the kidnapped victim. In the instant application, the applicant sought an order that he be acquitted and discharged of the kidnapping charge or that charge be struck out: on the grounds that (i) the prosecution could not succeed on the kidnapping charge as the victim had died; and (ii) in view of the murder charge, the kidnapping charge had become redundant. The application was based on s. 173(g) of the Criminal Procedure Code ('CPC') as well as the inherent powers of the court.

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Held (dismissing application):

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(1) Section 173(g) of the CPC could not be invoked by the applicant because (i) it was a power given to the subordinate courts in summary proceedings to deal with charges which were groundless; and (ii) the types of orders which the subordinate courts may grant were orders of discharge not amounting to an acquittal. (para 15)

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- (2) The inherent powers of the court could not be invoked to override an express provision of law or when there was another remedy available. The exercise of such powers was also strictly confined to procedural matters (*Dato' Seri Anwar Ibrahim v. PP*; *refd*). (para 23) A
- (3) As the supreme law of the land, the Federal Constitution (art. 145(3)) conferred sole prerogative powers on the Attorney-General ('AG') to institute, conduct or discontinue any proceedings for an offence or to decide whether or not to institute one or more charges against an accused person based on the same facts. The fact that consent to prosecute was given in the instant case meant that the prosecution had sufficient evidence to prove its case in court. It was premature for the applicant to argue that the prosecution was unlikely to succeed due to lack of certain evidence. The discretion vested in the AG was unfettered and could not be challenged and substituted by that of the court unless it was proven (and which was not proven in this case), that the discretion was exercised *mala fide*. Any interference by the court with the AG's discretion was tantamount to usurping his functions and conflicted with art. 145(3). (para 25) B
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- (4) The applicant had another remedy available, *ie*, to make representation to the AG to withdraw the kidnapping charge on the ground that the victim had died or because the applicant had subsequently been charged with the murder of the victim based on the same facts. It was entirely for the AG to decide whether or not to enter a *nolle prosequi* against the applicant. (para 25) E
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- (5) The inherent powers sought for was to strike out a charge against the applicant and this was strictly not a procedural matter. (para 25)

Case(s) referred to:

- Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 FC (*refd*) G
- Connelly v. DPP* [1964] 2 All ER 401 (*refd*)
- Dato' Seri Anwar Ibrahim v. PP* [2010] 7 CLJ 397 FC (*refd*)
- Dato' Seri Anwar Ibrahim v. PP* [2010] 8 CLJ 934 CA (*refd*)
- DPP v. Humphrys* [1976] 2 All ER 497 (*refd*)
- Karpal Singh & Anor v. PP* [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183 SC (*refd*) H
- Metropolitan Bank Ltd v. Pooley* [1881-1885] All ER Rep 949 (*refd*)
- Muniandy Thamba Kaundan & Anor v. Development & Commercial Bank Berhad & Anor* [1996] 2 CLJ 586 FC (*refd*)
- PP v. Ini Abong & Ors* [2009] 1 CLJ 526 HC (*refd*)
- PP v. Zainuddin Sulaiman & Ors* [1986] 1 CLJ 468; [1986] CLJ (Rep) 232 SC (*refd*) I

A Legislation referred to:

Courts of Judicature Act 1964, s. 25(1)
Criminal Procedure Code, ss. 4, 5, 173(g), 254
Federal Constitution, arts. 121, 145(3)
Kidnapping Act 1961, s. 3
Penal Code, s. 302

B**Other source(s) referred to:**

Sir Jack IH Jacob, *The Inherent Jurisdiction of the Court*, p 23

For the applicant - Manjit Singh; Eng Choo Beng R Naidu & Partners

For the respondent - Siti Fatimah Talib; DPP

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Reported by Ashok Kumar

JUDGMENT**D****Teo Say Eng JC:**

[1] The first and second accused were initially charged under s. 3 of the Kidnapping Act 1961 as follows:

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Bahawa kamu bersama-sama pada 20 April 2007, jam lebih kurang 10.00 malam, di rumah No. 2, Laluan Bercham Utara 17, Taman Utama, Ipoh di dalam Negeri Perak, telah menculik TEH WAI TOONG, KPT No. 761221-08-5981. Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum dibawah seksyen 3 Akta Penculikan 1961 (Pindaan 1997) dibaca bersama seksyen 34

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Kanun Keseksaan.

[2] The prosecution had subsequently instituted an additional charge under s. 302 of the Penal Code against both the accused persons as follows:

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Bahawa kamu bersama-sama pada di antara 26 April 2007 jam lebih kurang 2.30 petang sehingga 29 April 2007 jam lebih kurang 2.30 petang, di tempat buang sampah KM2, Jalan Felda Lasah, Lintang, dalam Daerah Sg. Siput (U), dalam Negeri Perak Darul Ridzuan, telah melakukan pembunuhan iaitu menyebabkan kematian ke atas TEH WAI TOONG, K/P No: 761221-08-5981. Oleh yang demikian kamu

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telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan dan dibaca bersama seksyen 34 Kanun yang sama.

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[3] The first accused (hereinafter to be referred to as the applicant) then filed an application before the High Court by way of motion under s. 173(g) of the Criminal Procedure Code as well as under the inherent powers of the court for an order of acquittal and discharge in respect of or for striking out the charge under s. 3 of the Kidnapping Act 1961.

[4] The application was supported by an affidavit affirmed by Mr Ramanaidu a/l Golla Somulu. The main ground of the application as stated in the notice of motion was that the charge under s. 3 of the Kidnapping Act 1961 was groundless, vexatious and an abuse of the process of court based on the following reasons: **A**

- (i) The prosecution could not succeed in proving the charge under the Kidnapping Act 1961 since the victim had passed away on 29 April 2007; and **B**
- (ii) Since the applicant is already charged with murder, the charge under the Kidnapping Act 1961 is redundant. **C**

[5] Learned counsel for the applicant submits that the High Court has powers under s. 173(g) of the Criminal Procedure Code as well as under the inherent powers to acquit and discharge the applicant from or to strike out the kidnapping charge in order to arrest a wrong at *limine* at the earliest opportunity. **D**

[6] He cited at least five cases in support of his contentions, namely:

- (i) *PP v. Ini Abong & Ors* [2009] 1 CLJ 526;
- (ii) *Karpal Singh & Anor v. PP* [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183; **E**
- (iii) *Connelly v. DPP* [1964] 2 All ER 401;
- (iv) *DPP v. Humphrys* [1976] 2 All ER 497; and
- (v) *Metropolitan Bank Ltd v. Pooley* [1881-1885] All ER Rep 949. **F**

[7] He also drew the court's attention to s. 25(1) of the Courts of Judicature Act 1964 as well as ss. 4 and 5 of the Criminal Procedure Code to support his contentions that the court has the inherent powers to arrest a wrong. **G**

[8] The prosecution objected strongly to the application made by the applicant. An affidavit in reply had been filed in support of its objections.

[9] The learned Deputy Public Prosecutor submits that the application was frivolous, without merits, baseless and an abuse of the process of the court based on the following grounds: **H**

- (i) There is no provision in the Criminal Procedure Code for striking out proceedings or acquittal without hearing all the evidence which the prosecution has to offer; **I**

- A (ii) Section 173(g) of the Criminal Procedure Code is not applicable to the proceedings in the High Court;
- (iii) It is the prerogative of the Public Prosecutor to institute, conduct or discontinue any proceedings for an offence against any person: art. 145(3) of the Federal Constitution. Such a discretion cannot be challenged and substituted by that of the court's: *Karpal Singh & Anor v. PP* [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183; and
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- (iv) Whether or not the prosecution could succeed in proving the kidnapping charge can only be determined after the court has heard all the witnesses. The prosecution cited the case of *Dato' Seri Anwar Ibrahim v. PP* [2010] 8 CLJ 934, Mahkamah Rayuan, to support its contention.
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- [10] The first issue for determination in hearing this application is to ascertain the types of order sought by the applicant. The applicant was applying to this court for an order of acquittal and discharge in respect of or for striking out the charge of kidnapping against him.
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- [11] I notice that the phraseology 'striking out' cannot be found in our Criminal Procedure Code. In fact what the applicant was praying was for an order of acquittal and discharge.
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- [12] The issue as to whether the courts have powers to grant an order of acquittal and discharge without hearing any evidence had been thoroughly canvassed by our courts in the past.
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- [13] The principles laid down by case law are that our courts have powers to acquit and discharge without hearing evidence only under two circumstances, namely:
- (i) After hearing all the evidence which the prosecution has to offer: *PP v. Zainuddin Sulaiman & Ors* [1986] 1 CLJ 468; [1986] CLJ (Rep) 232; and
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- (ii) Where the prosecution has declined to prosecute the accused further under s. 254 of the Criminal Procedure Code which reads:
- H Public Prosecutor may decline to prosecute further at any stage.
- (1) At any stage of any trial, before the delivery of judgment, the Public Prosecutor may, if he thinks fit, inform the Court that he will not further prosecute the accused upon the charge and thereupon all proceedings on the charge against the accused shall be stayed and the accused shall be discharged of and from the same.
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- (2) At any stage of any trial before a Sessions Court or a Magistrate's Court before the delivery of judgment, the officer conducting the prosecution may, if he thinks fit, inform the Court that he does not propose further to prosecute the accused upon the charge, and thereupon all proceedings on the charge against the accused may be stayed by leave of the Court and, if so stayed, the accused shall be discharged of and from the same. A
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- (3) Such discharge shall not amount to an acquittal unless the Court so directs.

[14] Having ascertained the types of order and under what circumstances the High Court may grant, the next issue for determination is whether the High Court has powers under s. 173(g) of the Criminal Procedure Code as well as under the inherent powers to acquit and discharge the applicant from the charge of kidnapping for the reasons furnished by learned counsel for the applicant. C
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[15] First and foremost I am of the view that s. 173(g) of the Criminal Procedure Code cannot be invoked for two reasons:

- (i) It is a power given to the subordinate courts in summary proceedings in dealing with charges which are groundless; and E
- (ii) The types of order which the subordinate courts may grant are orders of discharge not amounting to an acquittal.

[16] The only issue left for determination is whether High Court has the inherent powers to acquit and discharge the accused from the kidnapping charge or to strike out the said charge against him on the grounds raised by the defence. F

[17] In determining whether High Court has the inherent powers to acquit and discharge the accused from or to strike out the kidnapping charge on the grounds raised by the defence, one must, first and foremost, understand what the term 'inherent powers' means. Her Ladyship Heliliah Mohd Yusof, Federal Court Judge in *Dato' Seri Anwar Ibrahim v. PP* [2010] 7 CLJ 397 at p. 474 was trying to explain the meaning of 'inherent jurisdiction'. Her Ladyship had relied upon the *Concise Oxford Dictionary* to explain the word 'inherent' to mean existing in something especially as a permanent or characteristic attribute. She was then of the view that inherent jurisdiction is deemed to be part of the court's power to do all the things reasonably necessary to ensure fair administration of justice within its jurisdiction subject to valid existing G
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A laws including the constitution. She then concludes that inherent power is found within the very nature of a court of law, unlike power conferred by statute.

B [18] The meaning of ‘inherent powers’ has also been dealt with by Sir Jack IH Jacob in his article entitled “*The Inherent Jurisdiction of the Court* [1970] CLP at p. 23” where the learned author said:

C ... the jurisdiction to exercise these powers was derived, not from any statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called “inherent” ... the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life blood, its very essence, its immanent attribute ... The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law ...

D [19] From the exposition of the meaning of ‘inherent powers’ cited above, one may conclude that inherent powers do not derive from statute but are intrinsic in a superior court which are necessary to prevent injustice or its process being obstructed or abused.

E [20] In other words the High Courts derive their inherent powers not from the statute but from their nature as superior courts established under art. 121 of the Federal Constitution.

F [21] The fact that the High Courts have inherent powers similar to the courts in England had been recognised by our Federal Court in numerous cases. For instance, the Federal Court has reaffirmed that the High Court has inherent jurisdiction to set aside its own order where it can be proved to be null and void on the ground of illegality or lack of jurisdiction:

G *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 (FC); *Muniandy Thamba Kaundan & Anor v. Development & Commercial Bank Berhad & Anor* [1996] 2 CLJ 586 (FC).

H [22] The inherent powers of the High Courts have been extended to criminal cases by our then Supreme Court in *Karpal Singh & Anor v. PP* [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183 at p. 192 when LP Abdul Hamid Omar was of the view that the High Court may invoke such prerogative powers in rare instance to do justice to the accused.

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[23] However, the scope of such inherent powers of the High Courts is very limited. A study of the past judicial precedents reveals that the exercise of such inherent powers to prevent injustice or an abuse of the process of the court are subject to the following conditions:

- (i) The inherent powers apparently cannot be invoked to override an express provision of law or when there is another remedy available: *Karpal's case, supra*; and
- (ii) Such inherent powers are strictly confined to procedural matters only: *Dato' Seri Anwar Ibrahim v. PP* [2010] 7 CLJ 397 at p. 406.

[24] Based on the authorities cited, I agree with learned counsel for the applicant that this court has the inherent powers to set aside and quash a charge which is *mala fide*, oppressive or an abuse of the process of the court or when there is a miscarriage of justice. But such inherent powers must be exercised with the greatest caution.

[25] Having considered the grounds raised by the applicant that (i) the prosecution was unlikely to succeed in proving its case against the accused due to the reason that the victim had passed away, and (ii) the charge on kidnapping was redundant as the applicant had been charged with murder, I am not inclined to exercise the inherent powers to acquit and discharge the accused from the kidnapping charge or to strike out the charge against him for the following reasons:

- (i) Inherent powers cannot be invoked to override an express provision of law. The court must be careful that any exercise of the inherent power is not in conflict with the intention of the Legislature. Unlike UK, we have our Federal Constitution which is the supreme law of the land which has conferred sole prerogative powers on the Attorney General to institute, conduct or discontinue any proceedings for an offence: See art. 145(3) of the Federal Constitution and our Criminal Procedure Code which was intended to be the exhaustive pronouncement of the law relating to criminal procedure in Malaysia. It is the prerogative of the Attorney General whether or not to charge a person with an offence. It is the Attorney General who knows best the nature and the amount of evidence the police has gathered. Usually an instruction to charge will be given only if there is sufficient evidence gathered. In this case consent to prosecute has been given, meaning that the prosecution has gathered sufficient evidence to prove its case in court. Whether or not the prosecution would succeed depends on the evidence it has to offer. It is premature for the defence to argue that the prosecution is unlikely

- A to succeed due to lack of certain evidence. Similarly, it is the prerogative of the Attorney General to institute one or more charges against an accused person based on the same facts. The discretion vested in him is unfettered and cannot be challenged and substituted by that of the court's unless it is proven that the discretion was made *mala fide*: *Karpal Singh's* case, *supra*. There is no evidence
- B that Attorney General has acted *mala fide* against the accused. In the circumstances any interference by the court with the discretion of the Attorney General is tantamount to usurping his functions and is in conflict with art. 145(3) of the Federal Constitution.
- C (ii) In this case, it would appear that there is another remedy available, that is, it is for the applicant to make representation to the Attorney General for the withdrawal of the kidnapping charge on the ground that the victim had passed away or the accused had also been charged with murder based on the same facts. It is a matter entirely
- D for Attorney General alone to decide whether or not to enter a *nolle prosequi* against the accused.
- (iii) The inherent powers sought for is to strike out a charge against the accused which is strictly not a procedural matter.
- E [26] For the above reasons I dismiss the application.
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